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PP 93-253

January 4, 1995

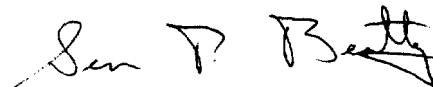
Mr. William Caton, Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Dear Mr. Caton:

On behalf of TeleCellular de Puerto Rico, Inc., enclosed for filing are an original and four copies of comments in the wide-area SMR rulemaking. Please stamp the file copy and return it to our courier.

If you have any questions regarding the foregoing, please contact the undersigned.

Very truly yours,



Sean P. Beatty

Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

RJAN - 4 1995

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Amendment of Part 90 of the) PR Docket No. 93-144
Commission's Rules to Facilitate) RM-8117, RM-8030
Future Development of SMR Systems) RM-8029
in the 800 MHz Frequency Band)

and

Implementation of Section 309(j))
of the Communications Act -) PP Docket No. 93-253
Competitive Bidding)
800 MHz SMR)

COMMENTS

TeleCellular de Puerto Rico, Inc. ("TeleCellular"), by its attorneys, hereby files comments with respect to the Further Notice of Proposed Rulemaking ("FNPRM") released by the Commission on November 4, 1994 in the above referenced dockets. The FNPRM proposes a new regulatory scheme in which the Commission will license 10 MHz of Specialized Mobile Radio ("SMR") spectrum on a wide-area basis. The FNPRM makes other proposals in an attempt to create regulatory parity for all commercial mobile radio service licensees.

I. INTRODUCTION

TeleCellular is a member of a joint venture that was formed to provide wide-area SMR service on the island of Puerto Rico. The SMR licensees participating in the joint venture control approximately 200 channels across the island. Unlike other proposed wide-area systems on the mainland, TeleCellular's intends to bypass construction of an analog system and proceed directly to a digital buildout.

For the last two years, TeleCellular's principals have expended a large amount of resources organizing SMR licensees into the joint venture, contracting for preliminary system engineering and seeking Commission approval for extended implementation of the digital buildout. With this large expenditure of time and money, TeleCellular's overriding concern in this rulemaking is to ensure that existing SMR licensees may continue construction of wide-area systems without waiting for the grant of a wide-area license.

II. DETAILS REGARDING NEW WIDE-AREA LICENSES

In the CMRS Third Report and Order, adopted on August 9, 1994 and released on September 23, 1994, the Commission concluded that, ". . . wide-area licenses should be used in the 800 MHz band" Third Report and Order, ¶97. Accordingly, these comments do not address whether the Commission should implement a wide-area licensing framework, but the details of such a framework.

A. Service Areas

TeleCellular agrees with the Commission that wide-area licensing should occur based upon Major Trading Areas ("MTA"). In Puerto Rico, this will ensure that wide-area licensees will have the maximum flexibility in offering services on the island. Puerto Rico is comprised of distinct population areas, and a wide-area SMR provider will not be able to compete successfully against other CMRS providers unless it can offer roaming across the entire island. An MTA license

will ensure that the future wide-area licensee can provide such services.

B. Amount of Spectrum designated for Wide-Area Licensing

Regulatory parity requires that 10 MHz be allotted for wide-area licensing. Cellular licensees are licensed for 25 MHz. The smallest PCS license covers 10 MHz, while the largest covers 30 MHz. To provide a wide-area licensee with the ability to compete with these other CMRS licensees, the Commission must allot 10 MHz for wide-area licensing.

C. Size of Wide-Area Blocks

The Commission proposes dividing the 10 MHz into four $2\frac{1}{2}$ MHz blocks. However, regulatory parity requires that the Commission issue only one MTA license covering the full 10 MHz. The only reason to issue four smaller blocks is to seek competition among SMR providers. Implicit in the Commission's determination that wide-area SMR licensees must be regulated in the same manner as cellular and PCS licensees is the recognition that all three types of licensees compete against each other. Accordingly, the Commission should promote competition at the macro level, i.e., between the different types of Commercial Mobile Radio Service ("CMRS") providers. A policy which, in contrast, makes competition among wide-area SMR licensees the priority by licensing four $2\frac{1}{2}$ MHz blocks will only hurt each SMR licensee's ability to compete with the other types of CMRS providers (cellular and PCS) who have access to much more spectrum. Disadvantaging wide-area SMR

licensees in this manner is especially unnecessary given that competition for traditional SMR services, such as dispatch, will continue on the lower 80 channels.

To put this argument in a different context, the Commission has not proposed taking spectrum from existing cellular licensees to create more competition among cellular providers. Instead, the Commission looks to PCS and wide-area SMR licensees to provide much needed competition to the two cellular licensees in each market. To bring added competition to fruition, the Commission should give future wide-area SMR licensees the tools to compete against the cellular and PCS licensees. One of those tools is a 10 MHz license. If the Commission is serious about creating competition among CMRS licensees, then it must create a wide-area SMR license that covers 10 MHz.

D. Spectrum Aggregation

TeleCellular agrees with the Commission that no individual spectrum aggregation cap for SMR frequencies is required. Even if a wide-area licensee somehow accumulated all available SMR spectrum in its market, it would still only hold approximately 14 MHz. As noted above, cellular and some PCS licenses cover more spectrum. With respect to other SMR licensees, there are other measures available for ensuring that adequate spectrum is available. The Commission should not pass overly restrictive rules that prevent spectrum from being put to its optimal use.

III. DETAILS REGARDING TRADITIONAL SMR LICENSES

TeleCellular agrees with the Commission that it should continue to license the lower 80 channels on a local basis. Such licensing should implement the second proposal contained in the FNPRM, i.e., local licensing should occur on a geographic basis using BTAs. FNPRM, ¶25. A BTA licensing plan would give a local SMR operator the same flexibility that the future wide area licensee will have, and that cellular and future PCS licensees currently have.

A BTA license should entitle the licensee to the use of five channels within the BTA. Incumbent licensees on the lower 80 channels should retain the same co-channel protection they currently enjoy. This will mean, in many instances, that a BTA licensee on a particular five channel group will not be able to construct a station within the BTA. Accordingly, as part of the application process for a five channel BTA license, the applicant should be required to specify one site within the BTA at which it can construct its channels while protecting incumbent licensees. Only applicants that can make this showing should be permitted to file for a particular BTA license. The construction requirement for a local BTA licensee should be the construction of one site. If an incumbent licensee in the BTA wins the license, previously constructed stations operating on the BTA license frequencies should satisfy the construction requirement. To prevent spectrum warehousing, an existing BTA licensee should only be

permitted to apply for more channels in the BTA once construction has been completed for any previously issued BTA license. However, licensees with unconstructed facilities in one BTA should be permitted to file a new application in another BTA. As the Commission has proposed, the lower 80 channels should also be available for use in a wide-area system.

In the event the Commission adopts a local licensing plan that calls for continued site specific licensing, it is appropriate to prohibit application for a new license on the lower 80 channels until all other authorizations on such channels in a given area have been constructed. The Commission's proposal, however, does not define the given area. For purposes of regulatory certainty, TeleCellular proposes defining "area" to mean any location within 40 miles of the unbuilt site. The 40 mile figure has a particularly historical allure, but more important than defining the actual figure is establishing certainty as to when an applicant may apply for another lower 80 channel authorization prior to constructing previously authorized channels.

IV. RIGHTS OF INCUMBENT LICENSEES

As described above, TeleCellular's prime concern in this rulemaking is to ensure that incumbent licensees have the flexibility and protection to continue construction of previously planned wide-area systems. Accordingly, TeleCellular agrees with the Commission's position that

incumbent licensees should be entitled to the same co-channel interference protection they currently enjoy under Section 90.621(b) of the Commission's rules.

The Commission has proposed establishing a fixed-radius protected service area for each existing SMR system. Under the Commission's proposal, the incumbent could construct new base stations within this radius as long as the 40 dBu contour of the new station does not extend the existing station's 40 dBu contour. TeleCellular agrees with the basic idea of this proposal and makes two comments. First, the rules should make it clear that all existing authorizations, whether constructed or not, are entitled to the fixed-radius protection. Within this fill-in scheme, the incumbent should designate those sites defining the geographic service area. For purposes of interference protection, those sites will be used for calculating separation distances pursuant to Section 90.621(b), even if the site is never constructed.

Second, the wording of the Commission's proposal suggests that the new base station cannot extend the originally authorized base station's 40 dBu contour. Instead, the Commission should pass a rule that permits construction of new base stations so long as the 40 dBu contour of the new station does not extend past the fixed-radius (30 kilometers as proposed by the Commission) of the originally authorized base station. On this issue, the Commission's proposal states that, ". . . we would allow the incumbent licensee to

construct new base stations within this radius of its originally authorized station provided that the 40 dBu signal strength contour of the existing station would not be extended by the new base stations." FNPRM, ¶40, p.25. TeleCellular believes that that sentence should be revised to say: ". . . we would allow the incumbent licensee to construct new base stations within this radius of its originally authorized station provided that the 40 dBu signal strength contour of the new base station does not extend past the fixed-radius of the existing station." Making this suggested change would have little, if any, impact on a future wide-area licensee while preventing adverse consequences to those licensees who filed for authorizations using the lower power and heights associated with a wide-area system.

In addition to the fixed-radius protected service area proposal, TeleCellular also requests the Commission to promulgate a rule permitting incumbent licensees to file for new base stations when the incumbent can demonstrate that, based on interference protection requirements, the wide-area licensee could not construct a transmitter at the new site, and that the new site would not materially extend the interference protection contour afforded to the incumbent. Furthermore, when considering whether a material extension of the protection contour has occurred, the Commission should permit multiple incumbents to aggregate their protection contours.

A real world example taken from Puerto Rico will illustrate the intent behind this proposal. In certain cases, TeleCellular participants have licenses on the same frequency at different points on the island. Pursuant to Section 90.621(b) of the Commission's rules, these two stations are entitled to a minimum of 55 miles protection. On Puerto Rico, the two stations have protection contours that overlap at the center of the island, meaning that there is no possible site on the island where a wide-area licensee could build a transmitter on that frequency. However, there would also be a large portion of the island not covered by the incumbents' 30 km fixed-radius construction contours. That area becomes an unserviceable no-man's land without the TeleCellular proposal. To solve this problem and encourage service on the frequency to all points on the island, the Commission should permit the incumbent to construct a new base station outside its fixed-radius protected service area. In this particular example, a new base station built between the two existing stations will not extend the protection contour already attributable to the existing stations. Accordingly, the wide-area licensee is not detrimentally impacted, and the incumbents are granted more flexibility in constructing their systems. To further ensure no detrimental impact to the wide-area licensee, the Commission could also issue licenses for such stations on a secondary basis.

While an incumbent's ability to offer SMR service should

be protected, TeleCellular also believes the Commission should provide some impetus for incumbent licensees to vacate the wide-area licensee's frequencies. To create this impetus, Telecellular recommends a mandatory relocation requirement at the end of a five year period. Five years after grant of the wide-area license, the wide-area licensee should be given the discretion to require any incumbent licensee to move off the wide-area frequencies. The ability to force this relocation would be contingent upon suitable alternative frequencies in the non-contiguous band. If there were insufficient non-contiguous channels to relocate all incumbent licensees, then the wide-area licensee should be given the discretion to decide which incumbents must move. By giving the wide-area licensee this discretion, the Commission would relieve itself of officiating disputes that might occur. The wide-area licensee would be responsible for all costs associated with the incumbent's relocation.

V. PENDING APPLICATIONS AND REQUESTS FOR EXTENDED IMPLEMENTATION

The FNPRM does not address the issue of whether the Commission will continue to process applications for additional facilities filed before August 9, 1994. A recent public notice indicated that, with help from the private sector, the Commission has started processing such applications. To the extent that the Commission is deciding whether such applications should be processed, TeleCellular strongly supports such processing. While a large number of

the backlogged applications undoubtedly cannot be granted, TeleCellular joint venture participants filed modifications earlier in 1994 that should raise no grantability issues and have a material impact on the rights attributed to them as incumbent licensees.

Similarly, the FNPRM makes no reference to how pending requests for extended implementation will be treated. The participating licensees of TeleCellular filed a joint request for extended implementation in May of 1994. The participating licensees made a good faith attempt to comply with the Commission's rules regarding extended implementation. The FNPRM does state that previously granted requests for extended implementation will continue to have effect. Except for the arbitrary factor of timing, TeleCellular's participating licensees occupy the same position as other recipients of extended implementation. There is no reason they should not be granted the same regulatory protections as those recipients that filed a few months earlier.

V. GENERAL CATEGORY AND INTER-CATEGORY SHARING

The Commission should pass rules that encourage the efficient use of available spectrum. This premise dictates against a blanket rule prohibiting the use of general category and inter-category sharing by SMR licenses. At the same time, TeleCellular agrees that Private Mobile Radio Service users may find no available frequencies for their use if SMR licensees were granted uninhibited access to those

frequencies. Accordingly, TeleCellular proposes a solution that permits use of general and inter-category channels upon a strong showing by the SMR licensee that it needs the channels. One possible way to show need would be to establish a new loading standard for digital systems. A wide-area licensee that can demonstrate loading, or some legitimate restriction on capacity (e.g., the existence of many incumbent licenses in a particular area of an MTA) should be permitted to apply for such channels. In conjunction with the application of existing rules pertaining to the use of such channels to local SMR operators, this proposal should ensure adequate spectrum for PMRS use, while maintaining flexibility for those SMR providers who truly need added capacity.

VI. ELIGIBILITY FOR THE INITIAL APPLICATION

The Commission has indicated that it will open application for wide-area licenses to any individual. However, TeleCellular contends that initial eligibility for wide-area licenses should be restricted to those entities that currently have licenses in a particular MTA, or, in TeleCellular's case, is composed of licensees in the MTA.

In a perfect market, with perfect information, an auction would ensure that the license goes to the bidder who values the license most. However, given the results of the IVDS auctions, where a significant number of bidders defaulted, and many bidders had little or no idea upon what they were bidding, it is clear that bidders do not have perfect

information. Given the existence of such bidders, it is not necessarily true that auctioning a license will result in its placement with the bidder who values it most.

As a further consideration for limiting eligibility, the Commission should acknowledge that if it were not for entrepreneurs who acted within the Commission's existing rules, there would be no impetus behind the creation of wide-area licenses. In essence, these entrepreneurs created value by making 800 MHz wide-area systems feasible, and now the Commission is stepping in to auction off that value. Looking at the issue from a different angle, it is impossible for those entrepreneurs to recapture the vast amount of resources expended on creating the initial stages of a wide-area system in order to finance the amount of a winning bid.

Based on the backlog of SMR applications currently existing, the Commission must be aware of the allure SMR presented to investors looking for a quick buck. The concern is that auctions for wide-area SMR licenses will present a cheap alternative to PCS licenses for promoters not entirely committed to constructing a wide-area system. By limiting eligibility for SMR licenses, the Commission would help ensure timely construction and service to the public, as well as reward those entrepreneurs who created the valuable license in the first place.

VII. AUCTION ISSUES

A. Upfront Payments.

The Commission seeks comment on the amount of upfront payment to be required for SMR auctions. FNPRM, ¶81. The Commission should not use the same upfront payment standard for SMR licenses as it uses for PCS licenses. While TeleCellular understands that one purpose of upfront payments is to ensure only serious, qualified bidders participate in an auction, the Commission should also follow a policy that upfront payments bear some relation to the value of the spectrum to be auctioned. Few people would argue that the "polluted" SMR spectrum is as valuable as the PCS spectrum. Accordingly, the upfront payment for SMR licenses should not be as great as the upfront payments for PCS licenses. Furthermore, establishing an upfront payment that is too great harms designated entities who receive an installment payment preference. Installment payments allow a designated entity to bid on a license without having the entire amount of its bid available. Establishing an excessive upfront payment contravenes the installment payment benefit. At a minimum, the Commission should refrain from establishing an upfront payment for SMR auctions until after comparable auctions (e.g. Block F PCS licenses) occur so that the decision may be based upon experience rather than conjecture.

B. Designated Entity Provisions.

The Commission has proposed that small business shall be

entitled to installment payments for purposes of paying off their bids. TeleCellular contends, however, that this is an insufficient provision to ensure that small business has the opportunity to participate in wide-area SMR license auctions.

Recent reports indicate that only thirty applicants qualified to participate in the MTA PCS auctions. That means that thirty applicants will be splitting approximately 100 valuable PCS licenses. Contrary to the requirements of the auction legislation, this paltry figure indicates that designated entities, including small business, do not have legitimate opportunities for valuable licenses in the new world of FCC auctions. However, given that auctions exist and in some respects are preferable to lotteries, the Commission should maximize the opportunities for small business, which, in this case, means that bidding credits should be granted to small business.¹

¹ One efficient way to incorporate this proposal would be to simply adopt the Broadband PCS designated entity rules for the SMR auctions.

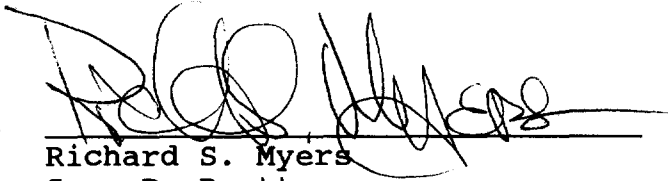
VIII. CONCLUSION

Based on the foregoing, the Commission should implement wide-area SMR licensing while at the same time issuing rules not only protecting incumbent licensees but ensuring that they have the flexibility to compete with new licensees.

Respectfully submitted,

TELECELLULAR DE PUERTO RICO, INC.

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